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No. 07-1178

IN THE

Supreme Court of the United States

JOEL HJORTNESS, A MINOR, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS ERIC HJORTNESS AND GAIL HJORTNESS, ERIC HJORTNESS, AND GAIL HJORTNESS,

Petitioners,

v.

NEENAH JOINT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
CONCLUSION	10

TABLE OF AUTHORITIES

CASES Page

Bd. of Educ. v. *Rowley*, 458 U.S. 176 (1982) 5
Deal v. *Hamilton County Bd. of Educ.*, 392 F.3d 840 (6th Cir. 2004) 1
Spielberg ex rel. Spielberg v. *Henrico County Pub. Sch.*, 853 F.2d 256 (4th Cir. 1988) 1
W.G. v. *Bd. of Trs.*, 960 F.2d 1479 (9th Cir. 1992) 2
Winkelman ex rel. Winkelman v. *Parma City Sch. Dist.*, 127 S. Ct. 1994 (2007) 8
Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 395 U.S. 100 (1969) 5

STATUTES

20 U.S.C. § 1400 *et seq* 1
§ 1415(f)(3)(E)(ii) 5

INTRODUCTION

Petitioners demonstrated that the decision below conflicts with that of other circuits on a fundamentally important question of federal education law: whether a school district can circumvent the procedural safeguards of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.*, by predetermining a child's placement in a public school before the meeting with the parents where the parents and district members are required to develop an individualized education program ("IEP") for the child. Respondent's opposition fails to show otherwise.

Contrary to respondent's claim, the holding of the decision below conflicts with that of other circuits. Respondent attempts to divert attention from the legal issues presented here by focusing on the parents' purported conduct, but the court of appeals' assertions in that regard are both irrelevant for purposes of certiorari and simply wrong. Finally, respondent fails to refute petitioners' showing that this case raises a fundamentally important question of federal education law because the court of appeals created an exception to the rule against predetermination in cases where the school district proposes public placement.

1. Petitioners demonstrated (Pet. at 15-21) that the decision below conflicts with other circuits' holdings that a school district commits a procedural violation of the IDEA by predetermining a child's placement before the IEP meeting with the parents and before the formulation of the child's IEP. See *Spielberg ex rel. Spielberg* v. *Henrico County Pub. Sch.*, 853 F.2d 256, 259 (4th Cir. 1988); *Deal* v. *Hamilton County Bd. of Educ.*, 392 F.3d 840, 857-59

(6th Cir. 2004); *W.G.* v. *Bd. of Trs.*, 960 F.2d 1479, 1484 (9th Cir. 1992). The court of appeals below held that a school district did not violate the IDEA when there were clear findings of fact that it unilaterally made a public school placement determination prior to the IEP meeting with the parents and prior to the formulation of the child's IEP. Respondent's attempts to deny this fundamental conflict are unavailing.

Respondent contends that the ruling below does not conflict with the holdings of other circuits that predetermination is a procedural violation of the IDEA because the court of appeals below merely concluded that no predetermination occurred here. See, *e.g.*, Opp. at 1, 10-12, 15-16, 23. Respondent, however, does not and cannot dispute that the court of appeals did not reject or find clearly erroneous the ALJ's unequivocal findings that predetermination occurred in this case. See, *e.g.*, Pet. App. 51a (the District "entered the IEP meeting having predetermined that the placement of the Student under the IEP to be developed at the meeting would be in the District schools"); *id.* at 56a ("Before the commencement of the IEP meeting on April 22, 2004, the District had predetermined that the placement under the IEP that had not yet been substantially developed by the IEP team, would be in the District schools."); *id.* at 66a ("the District steadfastly refused to consider the Parent's request that the District consider placement at SSOS"). In the face of these undisturbed findings, the court of appeals' holding that the IDEA was not violated here conflicts with the clear holdings of the other circuits and warrants this Court's review.

In this regard, contrary to respondent's suggestion, Opp. at 16, the four judges who dissented from the

denial of rehearing en banc plainly understood the panel majority's decision as "holding that predetermination was appropriate under the IDEA" and, therefore, creating a conflict with "the majority of decisions on the issue in the courts of appeal." Pet. App. 78a, 80a; see also *id.* at 79a-80a ("the panel majority concluded that predetermination was permissible so long as it resulted in a substantively appropriate public placement"). Their understanding belies respondent's contrary characterization. At the very least, it will lead lower courts in the Seventh Circuit to construe the law of that circuit as an "approval of predetermination" and decide cases accordingly, at least when the school district predetermines a public school placement. *Id.* at 83a.

Respondent also makes much of the panel majority's assertions about the parents' alleged non-cooperation in the IEP proceedings. Opp. at 1, 10, 20-21, 24-26. But the panel majority's assertions are both irrelevant for purposes of certiorari and simply wrong. First, the panel's gratuitous and unsupported assertions are completely irrelevant to the legal issue presented here. No matter how parents approach the IEP process and the IEP meeting in particular, the school district is not permitted to predetermine the child's placement prior to that meeting. That is, parental conduct at an IEP meeting plainly cannot justify a placement determination improperly made *prior* to that meeting. See Pet. App. 12a (Judge Rovner noting in dissent that the parents' alleged conduct with respect to the IEP meeting "made no difference" because respondent, "as the ALJ found, had already decided where to place" Joel). Parental behavior also is a particularly odd target for criticism where, as here, the parents' claim is that the IEP meeting was a one-sided and meaningless formality.

Even if the parents' involvement were germane to a school district's duty not to predetermine placement, it is clear that the Hjortnesses actively participated in the IEP process. The ALJ, the fact-finder in this case, made no findings that even remotely suggest that the Hjortnesses did not fully cooperate in all aspects of the IEP proceedings. To the contrary, the ALJ's findings belie any notion that the parents "did not want to participate in the process," "did not want to talk about goals and objecti[ves]," or only had the "one goal" of obtaining "placement at SSOS." See Opp. at 20, 26. The ALJ's findings show that the Hjortnesses were diligent and active participants in the meetings with the District. With respect to the IEP meeting in particular, neither the ALJ's findings nor the tape recording of the meeting suggest that Mrs. Hjortness did not participate in all parts of the discussion, including the discussion in general terms of annual goals and short-term objectives. Indeed, the ALJ's findings and the recording specifically reveal that Mrs. Hjortness addressed and provided input on several key topics discussed at the meeting aside from placement, such as the need for Joel's instruction in small group settings (Pet. App. 48a), the appropriate class size for Joel (*id.* at 49a), the need for direct instruction in social skills (*id.* at 50a), and Joel's need for extended school year services (*id.*).

The panel majority's assertions to the contrary are wholly untethered to the factual findings made by the ALJ, and the district court did not take any additional evidence that could provide a factual basis for these statements. Accordingly, the panel majority's assertions are not factual findings. The Court should disregard them because they contravene the well-established principle in IDEA cases that courts must grant substantial deference to the findings of

the trier of fact. See *Bd. of Educ.* v. *Rowley,* 458 U.S. 176, 206 (1982) (under the IDEA, reviewing courts are required to accord "due weight" to the determinations made during the state administrative process); see also *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 395 U.S 100, 123 (1969) ("The authority of an appellate court . . . is circumscribed by the deference it must give to decisions of the trier of the fact, who is usually in a superior position to appraise and weigh the evidence.").

Finally, there is no merit to respondent's suggestion that this case does not warrant review because the ALJ and the courts below concluded that Joel's IEP was substantively appropriate. Opp. at 9 (noting that petitioners do not seek review of these findings). This Court has made clear that the IDEA imposes procedural obligations on school districts that are separate from their substantive obligations. *Rowley,* 458 U.S. at 206-07 (describing the "twofold" nature of the courts' inquiry into the school district's conduct in IDEA cases). Because these obligations are independent, even when a school district satisfies its substantive obligations under the IDEA, its failure to follow proper procedures can deprive the child of a free appropriate public education. See 20 U.S.C. § 1415(f)(3)(E)(ii) (describing circumstances in which procedural violations can support findings of denial of a free appropriate public education, including where the procedural violation "significantly impeded the parents' opportunity to participate in the decision-making process"); Pet. App. 7a ("procedural inadequacies that result in the loss of educational opportunity result in the denial of a free appropriate public education"). Accordingly, the finding that no substantive violation occurred does not detract from

the certworthiness of the important procedural issues presented by this case.

2. Petitioners further demonstrated, Pet. at 21-23, that the decision below poses an "important question" of federal education law because in addressing the predetermination issue, the court of appeals essentially created an unauthorized statutory exception to the rule against predetermination in cases where the school district proposes public placement. Specifically, the court of appeals improperly suggested that the District's refusal at the IEP meeting to consider the parents' proposed private placement was a permissible application of the Act's presumption in favor of the least restrictive environment. Pet. App. 10a. Petitioners demonstrated that this reasoning is erroneous because pursuant to the IDEA's procedural requirements, the determination whether a proposed public placement will in fact provide the child with a free appropriate education must involve the parents and must be based on a fully developed and properly formulated IEP. Pet. at 20.

Respondent does not refute this argument. Instead, respondent simply repeats the reasoning of the court of appeals and asserts that it "makes perfect sense." Opp. at 22 Respondent, however, does not confront petitioners' analysis demonstrating that the court of appeals effectively sanctioned a backward process that is inconsistent with the IDEA's clear requirements.

Respondent does not dispute that it "determined" at the IEP meeting that Joel's placement would be in the public schools without considering the parents' views that this placement would not provide him with an appropriate education. *Id.* at 2 ("Neenah was not required to *consider* placement at SSOS, having

concluded that Joel could be educated in the public school") (emphases added); *id.* at 22 (acknowledging that the District "did not formally consider Joel's placement at SSOS" and asserting that "[t]he law simply did not require Neenah to *consider* SSOS once the IEP team *determined* that Joel could be educated at Neenah") (emphases added). But as petitioners demonstrated, Pet. at 20-21, the District's unilateral determination that public school placement would provide Joel with an appropriate education, without *considering* the parents' views to the contrary, was a fundamental violation of the IDEA. The statutory scheme requires the District to take into account the concerns of the parents on that issue and on whether private alternatives should be considered.

The IDEA likewise requires that placement determinations be based on a fully developed and properly formulated IEP. See Pet. at 20 (citing 20 U.S.C. § 1401(9) and 34 C.F.R. § 300.116(b)(2)). Respondent does not attempt to, and cannot, claim that this requirement was followed here: it is indisputable that Joel's IEP did not exist until *after* the meeting at which the District unilaterally determined his placement. Accordingly, the lower courts were simply wrong in holding that "[h]aving . . . concluded [that Joel could receive an appropriate education in District schools], the District was entitled to draft an IEP that assumed Joel would be educated in the District's schools," and respondent is wrong in endorsing this erroneous reasoning and asserting that it does not warrant this Court's review. See Pet. App. 28a (citing district court decision); Opp. at 22 ("Neenah appropriately chose to focus on developing an IEP that would provide Joel with FAPE in the least restrictive environment."). Again, the statute requires that the

IEP be the basis for the District's placement determination, not merely a document that conforms to and justifies a predetermined placement decision.

Petitioners have shown that this backward process, where the school district "determines" placement and *then* meets with the parents and formulates the IEP, eliminates the crucial role that parents play in helping to develop the IEP. Pet. at 22-23. This parental role is not only required by the statute, but also is a primary means to ensure that the IEP team makes a substantively appropriate placement decision. See *Winkelman ex rel. Winkelman* v. *Parma City Sch. Dist.*, 127 S. Ct. 1994, 2000-01 (2007) (discussing numerous IDEA provisions that "mandate or otherwise describe parental involvement"). As *amicus* Tourette Syndrome Association explains:

> The IEP meeting with parents provides school officials with an essential and incomparable window into the daily life, individual characteristics, strengths, and struggles of the child. Parents possess a wealth of information, gathered over the child's entire lifetime, giving them the most relevant and most comprehensive information on which the IEP should be based.

Br. for *Amicus Curiae* Tourette Syndrome Association, at 8. Moreover, parents play a particularly "indispensable role" in the IEP process when their children have "uncommon, complex, and often misunderstood disabilities." *Id.* at 3.

Contrary to respondent's contention, the court of appeals' decision will silence parents and therefore presents an issue of fundamental importance to the thousands of parents and students whose interests are protected by the procedural safeguards established under the IDEA. If the court of appeals'

decision is allowed to stand, countless school districts, under the guise of the "least restrictive environment" language, will choose a public placement as a means to avoid the Congressionally-required procedure of giving meaningful consideration to the parents' views in developing an appropriate educational program. This backward process will inevitably result in parents in the Seventh Circuit losing their opportunity meaningfully to participate in IEP meetings and, as a result, their children being placed in ostensibly "less restrictive" educational settings that do not provide them with appropriate educations.

* * * *

At the end of the day, it is essential that school districts and parents have a clear understanding of how the IEP process is supposed to work, particularly in cases where the parents oppose a school district's proposed public placement. See Br. for *Amicus Curiae* Autism Speaks, at 4 (parents and the public must have "confidence in the integrity of the IEP system"). The court of appeals' decision is irreconcilable with that of other circuits, creates needless confusion in this area, and should be "swiftly" corrected. Pet. App. 83a (Ripple, J., dissenting).

CONCLUSION

For the foregoing reasons, and for those presented in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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